



JORDAN RULE OF LAW PROGRAM

REPORT ON THE LIKELY IMPACT ON THE ADMINISTRATION OF JUSTICE
OF THE CONSTITUTIONAL AMENDMENTS RECOMMENDED
BY THE ROYAL COMMITTEE ON CONSTITUTIONAL REVIEW
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INTRODUCTION

In early August 2011 Tetra Tech DPK submitted to USAID/Jordan an analysis of current challenges to the reform of Jordan's justice system. The analysis included an examination of several elements of a possible Jordanian reform agenda and suggested the following as likely Jordanian priorities which USAID might wish to consider for its support:

- Restructure the Judicial Council as a constitutional body with a mandate, to be further elaborated in law, to recruit, train, assign, evaluate, promote, and discipline the judges and support staff of the judiciary and with the capacity to carry out that mandate.
- Establish a constitutional court empowered to review the constitutional validity of acts of the executive and legislative branches of government.
- Expand the criminal jurisdiction of the civil courts to include cases previously in the jurisdiction of the State Security Court and assure that the civil courts and the prosecution service are well prepared for this challenge.
- Create an institutionalized system to provide legal information, counsel, and representation to the poor and disadvantaged.¹

The DPK report gave prominence to the anticipated recommendations of the Royal Committee on Constitutional Review, relying on interviews and a published draft of the Committee's report. The first three of the four recommended priority areas related directly to the possible constitutional amendments. The fourth recommended priority reflected a widely shared view among Jordanians that increased legal knowledge and access to justice were important to enable the proposed constitutional reforms to have a significant and lasting impact. Extending the reach of the justice system would be an important part of integrating the populace into the democratic society to which the constitutional reform aspired.

The Royal Committee has now presented its final report to King Abdullah II.² Follow-on action may proceed rapidly in the coming months. In this regard, in accepting the Committee's recommendations on August 14, 2011, King Abdullah expressed his desire to see a "road map of political reform" to be completed by the end of 2011. This roadmap calls for Parliamentary adoption of the constitutional amendments in September and enactment of implementing legislation by the end of 2011, beginning with the high-priority political parties and elections laws. This would be followed by municipal elections "as soon as possible."³ In

¹ "Report on Prospects for Accelerated Reform of the Justice System of Jordan and a Strategy for USAID Support," August 2011, pages 17-18.

² Recommendations of the Royal Committee for Constitution Review, August 14, 2011, <http://www.jordanembassyus.org/new/pr/prdocs/EnglishAmendments.Final.pdf>.

³ Remarks of His Majesty King Abdullah II, August 14, 2011, <http://www.jordanembassyus.org/new/jib/speeches/hmka/hmka08142011.htm>.

light of these developments, USAID/Jordan has requested Tetra Tech DPK to prepare this examination of the likely impact of the Committee's final recommendations on the administration of justice in Jordan.

While some critics have complained that the proposed constitutional revisions are too modest, the prevailing reaction appears to be that the amendments are "a first step in the right direction." That is, they are being viewed by most observers with cautious optimism as necessary but not, in themselves, sufficient reform measures.⁴ Understandably, much of the attention has been focused on the proposals for political reform, especially the provisions relating to political parties and elections. However, the changes relating to the justice system are also profound. They provide a historic opportunity for dramatic progress toward greater judicial independence and accountability, institutional capacity and competence, and access to timely and nondiscriminatory justice. Whether that opportunity is realized will depend on whether the proposed reforms are adopted and how they are implemented.

PRINCIPAL JUSTICE-RELATED RECOMMENDATIONS OF THE ROYAL COMMITTEE

It has been observed that a constitution provides two distinct functions for a democratic society. Its normative role is to establish government institutions, set out the distribution of functions and powers among them, determine the limits of governmental authority, and prescribe the basic rules by which that authority will be exercised. But a constitution also serves a foundational role, setting forth ideals, aspirations, and values by which people want their society to be judged.⁵

This duality of purpose is certainly present in the case of the recommendations of the Royal Committee relating to the administration of justice. Some of the Committee's constitutional recommendations will involve major structural changes. Their implementation will require detailed legislation and regulations, extensive reorganization, and a host of institution

⁴ See, e.g., Muasher, Marwan, "Jordan's Proposed Constitutional Amendments – A First Step in the Right Direction," Carnegie Endowment for International Peace, August 17, 2011, <http://carnegieendowment.org/2011/08/17/jordan-s-proposed-constitutional-amendments-first-step-in-right-direction/4rmv>; AFP Amman, "Analysts Welcome Jordan Constitutional Reform Plans," Alarabiya News, August 17, 2011, <http://english.alarabiya.net/articles/2011/08/17/162719.html>; Omari, Raed, "Jordan: MPs Welcome Proposed Amendments as Important Step in Reform Process," Jordan Times, August 17, 2011, http://www.zawya.com/story.cfm/sidZAWYA20110817040638/Jordan_MPs_welcome_proposed_amendments_as_important_step_in_reform_process.

⁵ Lerner, Hanna, *Making Constitutions in Deeply Divided Societies*, Cambridge University Press, 2011, pages 17-18.

strengthening and public education measures. Other recommendations express fundamental principles and values that will set the tone for implementing the more operational provisions. The Committee's report also leaves open several questions that were addressed in earlier deliberations. In assessing the practical impact of the proposed constitutional amendments, the fundamental principles and values provide the most appropriate starting point.

Principles and Values

Article 27 introduces into the Constitution the declaration that the "Judicial Power is independent..." This forthright statement closes the debate about whether judicial independence in Jordan would be a good idea. It will now be a basic constitutional principle. As the Royal Committee stated in an explanatory memorandum accompanying its recommendations, "the word 'independent' was added to decisively assert the independence of the judicial power."⁶ This principle should infuse the entire body of legislation and practice in Jordan dealing with the judiciary.

Several amendments expand civil liberties and strengthen protection for human rights in ways that involve responsibilities for the independent judiciary. These include the following:

- In Article 7, a new paragraph 2 states that any "infringement on the rights and public freedoms or sanctity of private life of Jordanians is a crime punishable by law." Once this crime is described in specific terms in legislation it will be the responsibility of the criminal justice system to give it effect. (Although this provision of the Constitution refers only to "Jordanians" it presumably would be permissible to extend protection to non-Jordanians as well in implementing legislation.)
- In Article 8, the previous prohibition against unlawful detention or imprisonment is expanded to include also any other restriction of freedom or prevention of free movement. A new paragraph 2 will require that a person who is arrested, imprisoned, or detained be treated with respect for human dignity, not be tortured or harmed physically or mentally, and not be detained in unauthorized places. Further, any statement extracted under duress in violation of these prohibitions will not be given any consideration. It would appear that any of the specific infringements of rights prohibited by Article 8 would constitute crimes to be made punishable by laws enacted to give effect to Article 7, paragraph 2. In any event, it would be the responsibility of the courts to exclude from evidence any wrongfully obtained confession or other improperly "extracted" statement.
- In articles 15 and 17, derogation of the freedom of a newspaper to publish or the freedom of any person to communicate with privacy will henceforth require that the

⁶ Explanatory Memorandum on the Review of the 1952 Constitution of the Hashemite Kingdom of Jordan Issued in 2011, August 14, 2011, page 11, http://www.jordanembassyus.org/new/pr/prdocs/English_Explanatory_Memorandum.Final.pdf.

authorities seeking to interfere with those freedoms first obtain a judicial order affirming that the restriction is authorized by law.

- Article 101 requires that civilians be tried before civilian judges, with exceptions permitted only in cases of high treason, espionage, or terrorism. (This protection is related to a structural change in the State Security Court, discussed below. As indicated in that later discussion, the government has apparently decided to propose to Parliament the retention of jurisdiction by the military-dominated State Security Court over civilians charged with drug crimes.⁷) Article 101 also adds a requirement that in all cases courts must pronounce their verdicts in public session, even if the court had closed the proceedings. In addition, this article adopts – for application by the courts – the standard that the accused is innocent until proven guilty.
- Finally, Article 128 captures the spirit in which the above-described rights have been included in the proposed amendments. A new paragraph 1 declares that “laws issued by virtue of this Constitution to regulate the rights and freedoms shall not impair the substance of these rights or affect their fundamentals.” Judicial application of this broad standard will surely present some difficulties of interpretation in individual cases. But the basic intent is clear: implementing legislation is not expected to survive judicial scrutiny if it contravenes the spirit of the principles and values set out in the Constitution.⁸

The heightened emphasis on human rights throughout the proposed amendments appears to be motivated, at least in part, by the Royal Committee’s desire to assure consistency with applicable international standards. For example, in several places the text follows the language of the International Covenant on Civil and Political Rights, a widely subscribed human rights treaty to which Jordan is a party.⁹

Structural Changes

Articles 55-57 will eliminate the existing High Tribunal for trying criminal cases against government ministers arising from the performance of their duties. The legal basis for action by this High Tribunal has been impeachment by a two-thirds majority of the Chamber of Deputies. It consists of a mixed group of four Senators and five senior judges.

⁷ See note 15, *infra*.

⁸ As stated in the Royal Committee’s Explanatory Memorandum, “This provision...was meant to block any practice of authoritarian legislation or that which would take away from people the rights they are entitled to enjoy as humans. It was also meant to provide real protection of freedom in real life practice and serve as a guarantee to safeguard human rights.” Explanatory Memorandum, note 6, *supra*, page 21.

⁹ The Covenant is in force among 167 states. See <http://www2.ohchr.org/english/law/ccpr.htm>. Among other subjects dealt with in the proposed constitutional amendments, the Covenant addresses the duties of parties to respect the human dignity of detained persons, refrain from torture, preserve freedom to communicate, presume innocence until proven guilty, and provide court verdicts in open session. The International Court of Justice has found the Covenant to be a source of international human rights law that operates for the benefit of individuals, including nationals of other countries. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment of November 30, 2010, <http://www.icj-cij.org/docket/index.php?p1=3&code=gc&case=103&k=7a>.

The replacement for the High Tribunal will be the Amman Court of Appeals, acting through a five-judge panel to be selected by the Judicial Council. The court will receive a case after the Chamber of Deputies, by majority vote, refers the case to the Attorney General. The proposed amendment appears to assume there will be a rapid conclusion of any prosecution of a minister because it prohibits the suspension of the accused individual from office until there is a final ruling of conviction. Pending the court's decision, therefore, an accused minister would have greater security of tenure than those ministers who are not accused of wrongdoing. Reportedly, the government does not favor that result and has proposed a modification of the Committee's proposal.¹⁰

The Royal Committee's explanatory memorandum states that this amendment restores the power of the judiciary, "which means that there are no more exceptions from the rule of overall judicial jurisdiction." It continues with the following statement of intent:

Ministers will have sufficient guarantees, but they will receive no preferential treatment that necessitates special arrangements as they are citizens and should be tried before regular courts for violations attributed to them in accordance with the basic principles of justice and equality before the law.¹¹

Articles 58-61 direct the establishment by law of a constitutional court as "an independent and separate judicial body." The court's legislative charter will determine how it functions and is managed, how to appeal before it, and related matters. However, the Constitution will specify a number of the features of this new judicial body. The Royal Committee describes the establishment of the Constitutional Court as "an extremely significant juncture in the accelerating efforts to apply democracy in a manner ensuring consistency with the highest international criteria."¹²

According to the proposed amendments, the court will have nine members, all appointed by the King. Seven members will constitute a quorum and six votes will be required for a decision. Members will be selected from among candidates at least 50 years of age who are

¹⁰ A recent press report indicates that the government has modified the language recommended by the Royal Committee on the status of a minister against whom criminal charges are brought. Instead of prohibiting the accused minister's suspension (as recommended by the Committee), the government's change reportedly would require that the accused be suspended immediately upon being charged. See "Government reveals more changes to constitutional amendments," *Jordan Times*, August 29, 2011, <http://www.jordantimes.com>.

¹¹ Explanatory Memorandum, note 6, *supra*, page 11.

¹² Explanatory Memorandum, note 6, *supra*, page 13.

current or former members of the Court of Cassation, current or retired law professors, or legal experts or specialists. They will serve for four-year renewable terms, during which they may not be dismissed.

The Constitutional Court will have two kinds of jurisdiction:

- First, it “shall” rule on challenges to the constitutionality of laws and regulations in force. Challenges may be presented by the Council of Ministers, the Senate, or the Chamber of Deputies – or by the Chief Judge of the pertinent Court of Appeals with respect to a pending case. The discretion of a Chief Judge to decline to present an asserted constitutional challenge to the Constitutional Court may be constrained by a government-proposed change.¹³
- Second, the Constitutional Court “has the right” to interpret provisions of the Constitution if requested by the Council of Ministers or by a resolution passed by an absolute majority of either the Senate or the Chamber of Deputies. (This second category of jurisdiction empowers the Constitutional Court to perform a role previously envisioned for the High Tribunal, described above. Under a related amendment to Article 122, once the Court is established the High Tribunal will cease to exist.)¹⁴

Rulings of the Constitutional Court will have the force of law, binding on all authorities, and will be published in the Official Gazette.

Article 71 will transfer from the Chamber of Deputies to the judiciary the function of adjudicating challenges to the validity of elections of members of the Chamber of Deputies. Any voter may petition the Court of First Instance for the electoral district concerned within 15 days after the elections results are announced. A three-judge panel of the court must hear the challenge and issue a final ruling within 30 days after the case is filed. The decision of the Court of First Instance may not be appealed.

In Article 98, a new paragraph 2 will give the Judicial Council a constitutional status. The Council is to be established by law. It will be responsible for matters related to the civil

¹³ A recent press report indicates that the government has modified the language recommended by the Royal Committee on how constitutional challenges can be presented. The change reportedly would give Jordanian citizens who are litigants in cases pending in the civil courts the right to raise constitutional challenges through the Chief Judge of the relevant Court of Appeals. See “Government makes changes to constitutional amendments,” *Jordan Times*, August 25, 2011, <http://www.jordantimes.com>.

¹⁴ Article 122 of the present Constitution authorizes the High Tribunal that tries charges against Ministers to interpret the constitution upon request from the executive or the legislative branch. Under the proposed constitutional revision, trials of Ministers will now be before a panel of the Amman Court of Appeals and constitutional interpretation will be the responsibility of the Constitutional Court.

courts, including the sole right to appoint civil judges, and will have additional powers relating to the judicial career as may be provided by law. The conferral on the Judicial Council of “the sole right to appoint civil judges” must be read as a limitation on the permissible discretion under the unchanged paragraph 1 of the same article, which states that judges “shall be appointed and dismissed by a Royal Decree in accordance with the provisions of the law.”

In Article 100, a new clause requires that the law establishing the High Court of Justice provide for an administrative judiciary at two levels. This mandates a departure from existing legislation, which provides for only a single level of adjudication in administrative litigation with no right of appeal. As stated by the Royal Committee, this “new development...ensures individuals the right to appeal...”¹⁵

Article 109 requires that the laws pertaining to the Tribunals of Religious Communities shall henceforth determine the requirements of appointing the judges for those tribunals. This requirement applies only to the religious courts dealing with personal status of non-Muslims. (Article 99 of the Constitution divides the courts into three categories: civil, religious, and special; Article 104 further divides the religious courts into Sharia and other religious communities. These articles remain unchanged by the proposed amendments.)

In Article 110, a new Paragraph 2 expressly limits the jurisdiction of the State Security Court to high treason, espionage, and terrorism. This confirms that the operation of that court will be fully consistent with the amendment to Article 101 prohibiting trials of civilians for offenses other than those three specified crimes “before a court whose judges are not all civilians.” (A reported proposal by the government would have the State Security Court retain jurisdiction over drug crimes in addition to the three security offenses recommended by the Royal Commission.)¹⁶

¹⁵ Explanatory Memorandum, note 6, *supra*, page 18. A recent press report indicates that the government has modified the language recommended by the Royal Committee to change the name of the High Court of Justice to “Administrative Court.” *Jordan Times*, August 29, 2011, <http://www.jordantimes.com>.

¹⁶ A recent press report indicates that the government has modified the language recommended by the Royal Committee on the jurisdiction of the State Security Court. Reportedly, the government has decided to continue to subject civilians to trial before military judges for drug crimes. The reported statement by the government does not indicate the scope of drug crimes to be heard by the State Security Court. Therefore, it is not clear whether this additional exception to the principle of civilian courts trying civilians will extend to even minor drug-related offenses. See “Government reveals more changes to constitutional amendments,” *Jordan Times*, August 29, 2011, <http://www.jordantimes.com>.

Remaining Questions

In some cases, the precise intent of the proposed amendments is open to interpretation. Also, some changes included in the earlier published draft recommendations were not included in the final version. As a result, questions of interpretation may arise in Parliamentary consideration of the Royal Committee's report, in the process of implementing the amendments that are adopted, or in requests for judicial interpretation of the amended constitution. Some significant remaining questions are summarized below.

Equality of Male and Female Citizens

The draft recommendations had included amendments to Articles 5 and 6 to assure that children could inherit Jordanian nationality from either parent and to prohibit discrimination based on sex. Although the final version emphasizes human rights and civil liberties, it does not address these issues of gender equality. It leaves unchanged the Constitution's prohibition of discrimination based on race, color, language, or religion. The courts may need to decide on the permissibility of discrimination based on sex.

Restraint of publication

The final version of Article 15 protects newspapers against suspension of publication in the absence of a judicial order. The draft revision would have extended this protection to other forms of media as well. Again, the courts may be asked to decide the validity of suspensions of publications (including electronic media) by government action in cases where no judicial authorization has been obtained.

Ratification of treaties

The final version of Article 33 expands the kinds of treaties that require approval by the National Assembly. Among these are those treaties "which impinge on [Jordan's] sovereignty rights." Virtually every treaty represents an acceptance of some limitation of a sovereign's rights in exchange for other sovereign rights. It is unclear, therefore, what, if any, treaties can be ratified without National Assembly approval. A government proposal, however, would restore the original language of Article 33.¹⁷

¹⁷ A recent press report indicates that the government has rejected the language recommended by the Royal Committee with respect to the ratification of treaties and has decided to retain the original language of Article 33. See "Government reveals more changes to constitutional amendments," *Jordan Times*, August 29, 2011, <http://www.jordantimes.com>.

Categorization of the Constitutional Court

Article 58 declares that the Constitutional Court is to be “an independent and separate judicial body.” However, Article 99, which specifies the categories of courts as civil, religious, and special, does not provide a separate category for this new court. (The published draft amendments would have deleted Article 99 and related references to categories of courts, leaving the Judicial Council in a position of oversight and support for the entire judiciary.) If the Constitutional Court is to be considered a civil court it would seem appropriate for legislation to specify that it will operate with support from the Council consistent with the court’s independent status. The published draft amendments had provided that the Judicial Council would nominate members of the Constitutional Court. It is not clear whether there would be any objection to including such a procedure in legislation.

Special Tribunal to Interpret Legislation

The Royal Committee described the Constitutional Court’s replacement of the High Tribunal as the forum for trying ministers under Article 57 and also for interpreting the Constitution under Article 122 as a restoration of the power of the judiciary, leaving “no more exceptions from the rule of overall judicial jurisdiction.”¹⁸ Yet, the Committee retained the mixed political-judicial Special Tribunal under Article 123 to interpret laws. This seems inconsistent with the principle that authoritative interpretation of the laws is a judicial function. The published draft amendments would have deleted the Special Tribunal provided for in Article 123.

IMPACT OF THE CONSTITUTIONAL AMENDMENTS

The changes to the Constitution recommended by the Royal Committee, described above, have enormous potential to strengthen the rule of law and to dramatically improve the capacity of the justice system to fulfill its role as an independent branch of government providing valuable service to the nation and its people. However, as many commentators have observed, the constitutional amendments are only the first step. Realization of their potential will depend upon the quality and timeliness of implementing legislation and the skill and determination of the judicial institutions to develop the capacity to demonstrate by their performance the value of the reforms.

¹⁸ Explanatory Memorandum, note 6, *supra*, page 11.

Judicial Council

The most profound impact of the constitutional amendments on the administration of justice will be achieved through a rigorous execution by the Judicial Council of its new constitutional mandate. More than anything else, how the Judicial Council is organized (including how its membership is determined), how the Council is empowered by its legislative charter, and how it carries out its new authorities will determine the meaning of the declaration in Article 27 that “the Judicial Power is independent.”

Basic questions about Council organization and membership include whether all members should be judges and whether some of them should be elected by the judiciary rather than by *ex officio* designations of certain senior judges. As noted by authorities cited in the earlier Tetra Tech DPK report, a participatory approach is considered a good practice based on international experience.¹⁹

The implementing legislation will have to recognize the Council’s exclusive authority to appoint judges under Article 98. That “sole right” should exclude any role for the Ministry of Justice or other authority. The Council should select candidates for appointment and refer them to the King, whose Royal Decree should then be a formality.

Other powers of the Judicial Council will need to be decided in the legislation, consistent with the constitutional principle of an independent Judicial Power. This legislation presents a historic opportunity for bold measures to end the tradition of dependence by the judiciary on the executive. If not seized, that opportunity could be lost.

Particular responsibilities that might be placed by law in the Judicial Council include the following:

- Training of judicial candidates, judges, and support staff of the judiciary, including a transfer of the Judicial Institute of Jordan from the Ministry of Justice to the Judicial Council.
- Assignment, evaluation, promotion, and discipline of judges and support staff, including a transfer of the Inspection Department from the Ministry of Justice to the Judicial Council. (This would also involve the creation of a support staff specialized in court administration that would be accountable to the Judicial Council rather than to the Justice Ministry.)

¹⁹ See, e.g., Consultative Council of European Judges, “Council for the Judiciary at the Service of Society,” November 2007, <http://www.rechtspraak.nl/English/Publications/Documents/opinion-10-2007.pdf>.

- Establishing a special regime for judges serving as prosecutors to encourage specialization, training and extended assignments.
- Rulemaking authority to enable the Judicial Council to introduce procedural innovations in the interest of increasing efficiency and effectiveness. (Streamlined procedures could help overcome Jordan's low ranking in resolving commercial disputes and its high percentage of the prison population that has not been tried and convicted of any offense. In addition, it would facilitate the timely disposition of those sensitive cases, such as election disputes, trials of ministers, or suspension of a newspaper's publication, where prompt judicial action will be necessary.)
- The right to present directly to Parliament a budget for the Judicial Council and the civil courts. Because the constitutional amendments retained the distinct categories of civil, religious, and special courts, this function would need to be coordinated with the budget processes for the religious and special courts, which are not under the authority of the Judicial Council.

Other issues that might be addressed in the legislation include security of tenure and preservation of salary and benefits for sitting judges, authorization for a judges association,²⁰ and a special regime for the relationship between the Judicial Council and the Constitutional Court. (This subject could alternatively be addressed in the legislative charter for the Constitutional Court.)

Most of the above-mentioned possible subjects for a revised legislative charter for the Judicial Council are likely to encounter some resistance. Doubts about judicial independence have not disappeared and the doubters will want to construe narrowly the Judicial Council's mandate. Arriving at an acceptable legislative package will involve broad consultation – among judges, with the government and Parliament, and throughout the legal community and civil society.

The ambitious legislative agenda set out in the above list implicitly commits the Judicial Council and the civil courts to carry out their increased responsibilities efficiently and effectively. Legislative authority should be sought only to the extent there is reason to believe that it will be exercised successfully. Accordingly, even as the elements of the legislation are being developed, the Judicial Council would be well advised to undertake an intensive self-examination of its needs and capacities, drawing on the knowledge and experience of sitting judges. It should seek to convert this analysis into a prioritized work plan that will maximize capacity and competence to carry out an expanded legislative mandate. Presumably, acceleration of the development of the Council's recently established three administrative

²⁰ The Royal Committee has recommended an amendment to Article 16 of the Constitution providing that Jordanians are entitled to establish associations, subject to regulation by law.

units would be emphasized in the work plan.

Constitutional Court

The other truly profound impact of the constitutional amendments will result from the creation of the Constitutional Court. The number of cases decided by this single court of nine judges is not likely to be large, especially in comparison to the workload of the regular courts. Yet, each decision will represent an authoritative interpretation of the Constitution. While the regular courts have made constitutional rulings from time to time, the new Constitutional Court is unique in being created for the express purpose of invalidating acts by Parliament or the government that it finds to contravene the Constitution.

As in the case of the Judicial Council, many details about the operation of the Constitutional Court will be determined by a legislative charter to be developed. These might include how the nine judges will be selected, how the court will be managed, whether the court will have authority to prescribe and modify its rules of procedure, and what safeguards will assure both independence and accountability.

An important issue is whether the court will have authority to decline to accept a case, for example, if it concludes that the case does not present a significant constitutional question. This could help to limit the court's vulnerability to being drawn into political disputes and also avoid being inundated with frivolous petitions for constitutional review.

As suggested in the earlier Tetra Tech DPK report, USAID's principal interest would seem to be that these issues be decided in a considered manner, with full information so as to minimize the risk of unintended consequences.

Other Amendments

Beyond the two fundamental changes concerning the Judicial Council and the Constitutional Court, the principal impact of the recommended constitutional amendments on the administration of justice will be to create broad reliance on the judiciary and high expectations for judicial performance. The amendments do this in several ways.

First, they increase the jurisdiction of the civil courts. This expanded jurisdiction is not likely to involve a statistically significant increase in the volume of cases. However, the kinds of cases involved will tend to be of high visibility because of their time sensitivity and importance. Specifically, the courts will now have a constitutional responsibility for:

- Trials of ministers for offenses in the performance of their official functions (Article 55).
- Determination of the constitutional validity of laws and regulations in force and interpretation of the Constitution (Article 59).
- Determination of the validity of elections to the Chamber of Deputies (Article 71).
- Trials of civilians for major crimes previously within the jurisdiction of the State Security Court (Article 101).

The amended Constitution also looks to the courts for the enforcement of an expanded enumeration of constitutionally protected human rights. For example:

- Humane treatment of arrested or detained persons (Article 8).
- Exclusion from evidence of statements extracted under duress (Article 8).
- Safeguarding lawful newspaper publication (Article 15).
- Safeguarding the privacy of lawful communications (Article 18).
- Assuring that the presumption of innocence is applied (Article 101).

The declared policy of judicial independence, the new institutional structure, the expanded jurisdiction of the courts, and the increased emphasis on judicial protection of human rights constitute a powerful combination. Together, these provisions create an expectation that Jordanians should be able to rely on the judiciary to perform a number of difficult tasks. The courts will establish independent and capable institutions and systems. They will decide hard cases promptly and fairly. They will wisely interpret the constitution. And they will protect human rights. Meeting those expectations will be a major challenge.

SEIZING THE OPPORTUNITY AND RESPONDING TO THE CHALLENGE

While the challenge of expectations is formidable, as suggested at the outset of this analysis it is important to bear in mind the historic opportunity the constitutional amendments represent to strengthen the rule of law as a foundation of a democratic Jordanian society.

Considerations for the Judiciary

As the judiciary develops its plans to seize the opportunity and respond to the challenge it will need to bear in mind several important factors, including the following:

- First, developing and implementing the reforms will require both time and money. A preliminary timeline and estimate of additional budgetary resources will need to be early priorities. It will be an important threshold test for the

existing Judicial Council to initiate the process that will lead to a dramatically changed institution. The Council is starting from a position of dependence on the executive. Yet, it seems essential that the judiciary itself take ownership of the reform process in order to build the independence, accountability, capacity, and competence to meet the expectations implicit in the constitutional amendments.

- Second, the existing Judicial Upgrading Strategy (JUST) is primarily a Ministry of Justice initiative which does not necessarily reflect the policies and priorities of the amended constitution. It would seem necessary to undertake an early review of JUST to determine which activities should be continued because they respond to current priorities, which need to be modified, and which are superseded by the new constitutional structure.
- Third, the success of this important reform of the justice system will require public awareness and support. Part of the challenge will be for civil society, through monitoring and advocacy, to be actively involved in the reform process. Another part of the challenge will be meeting the heightened expectation of Jordanian citizens that the amendments make a real difference to them. Increased access to justice – knowledge of the law, competent legal counsel and representation, and the availability of affordable, timely and fair dispute resolution will make the reforms meaningful. Public support for reform has played a vital role thus far in the openings that are evident in the constitutional amendments. That same public support will be crucial to translating those amendments into practical, beneficial, and substantive results.

The importance of the opportunity, the difficulty of the challenge, and the remaining imbalance between the judiciary and the executive suggest that a structure of judicial leadership and stakeholder support will be important ingredients of success. It would seem that the Judicial Council needs to be at the center and that the first level of support must come from within the judiciary itself. A second level could be provided by reform champions within the broader Jordanian community, including both the public sector and civil society. International partners, while always respectful of local ownership, could provide encouragement and support at all levels.

Considerations for USAID

The four priorities recommended in the earlier Tetra Tech DPK report (quoted in the introduction of this memorandum) remain an appropriate focus for USAID.

- The final report of the Royal Committee confirms the need to convert the Judicial Council into the leader of an independent judiciary. This is an area where USAID is well positioned to provide effective support.
- The challenge of extending access to justice more broadly throughout the population takes on an added importance if the Royal Committee's emphasis on human rights and civil liberties is to have a practical impact on people's lives. USAID has a wealth of experience in working with civil society on local reform

initiatives such as systems for increasing public awareness and providing legal knowledge and services.

- The creation of the Constitutional Court is obviously a development of great importance which USAID should support for that reason, even though USAID's role will be a limited one. Harmonized international support to help assure informed decisions in the court's design and development can be a valuable service.
- Finally, the Royal Committee's expansion of the criminal jurisdiction of the civil courts with what are likely to be high-profile cases confirms the need to strengthen the capacity of the criminal justice system, especially the prosecution service. This need is even greater because of the several human rights guarantees regarding criminal justice that the Royal Committee has recommended. (These include, for example, the exclusion of evidence obtained by duress and the presumption of innocence.) The ability of the courts to manage criminal cases will be an important measure of the success of judicial reform. Again, this is an area where USAID can draw on its considerable expertise to support local criminal justice reform efforts.

Other justice-related constitutional reforms, such as the creation of two levels of administrative justice, will require attention, but lack the same coincidence of urgency and importance and do not warrant the dilution of USAID's efforts that would be needed.

As USAID engages in consultations with the judiciary, the government, the Parliament, and civil society, as well as with Jordan's other international partners engaged in the justice sector, the sequence of events will be an important factor. The expectation is that the Parliament will take up the constitutional amendments in September. Undoubtedly, the government will form expert groups simultaneously to prepare implementing legislation. As legislative proposals emerge, they will be presented to Parliament, with priority on the calendar for the legislation on elections and political parties. This process is likely to continue over several months. During this period, the concerned institutions will be developing their own plans to build or strengthen their capacities to carry out their new or increased responsibilities.

In this dynamic environment, a wide ranging consultation should begin as soon as possible in order to keep USAID informed of developments and able to engage in ways that will contribute to the ability of Jordanians to make the most of the opportunity for justice reform that is available in 2011. The following list of issues, which summarizes the analysis provided in this report, may be a helpful tool for this purpose.

Subject: Adoption of constitutional amendments

USAID Objective: To gain understanding of the process, timing, and key issues.

Issues:

- What are the procedures and likely timeframe for adopting the amendments?
- Are any of the amendments considered controversial and likely to be the subject of debate and possible modification?
- Is the omission of a guarantee of male-female equality (as earlier proposed) intended to leave gender equality issues for the courts?
- Do the declaration of an independent judicial power and the elevation of the Judicial Council to the status of a constitutional body imply a decision to empower the judiciary to end its dependence on the executive?
- If the policy of the Royal Committee was to consolidate dispute resolution and legal interpretation functions in the judiciary, why was the Special Tribunal under Article 123 retained as an alternative to the courts?

Subject: Implementing legislation to empower the Judicial Council

USAID Objective: To encourage and support the enactment of a sound legislative basis for governance of an independent and accountable judiciary.

Issues:

- What will be the process for developing the legislation? Will there be a committee of experts? Who will participate? What timeframe is foreseen?
- Would it be helpful for international partners to finance objective background information or technical advice from international organizations with expertise on issues of judicial councils and judicial independence – such as the Consultative Council of European Judges or the International Commission of Jurists?
- Who will be the members of the Council? How will they be selected? Could some of the members of the Council be elected by the judges?
- Will Council members have security of tenure to enhance their independence?
- Could the Council assume broad responsibility for human resource management in the judiciary – recruitment, training, assignment, evaluation, promotion, and discipline of judges and support staff?
- Beyond human resources, is it envisioned that the Judicial Council will have broad authority over administrative and financial management of the judiciary?
- Is it foreseen that entities in the Ministry of Justice, such as the Inspection Department and the Judicial Institute of Jordan, will be placed under the authority of the Judicial Council?
- What are the budgetary requirements for expanding the role and increasing the capacity of the Judicial Council, both start-up costs and continuing requirements?
- How will the legislation promote the independence of individual judges – protection against reduced compensation, assured tenure subject to good behavior, authorization for a judges association?
- How will the legislation promote accountability of the judiciary (including the Judicial Council itself)? Will there be requirements for transparent proceedings,

audit of finances and operations, codification of ethical standards and disciplinary proceedings?

- Will the Judicial Council have regulatory authority to foster procedural streamlining in the interest of fairness and efficiency?
- Will the Judicial Council be empowered to present a judicial budget to Parliament?

Subject: Implementing legislation to create the Constitutional Court

USAID Objective: To encourage and support the enactment of a sound legislative basis for this new institution.

Issues:

- What will be the process for developing the legislation? Will there be a committee of experts? Who will participate? What timeframe is foreseen?
- Would it be helpful for international partners to finance objective background information or technical advice from international organizations with expertise on constitutional courts such as the Max Planck Institute for Comparative Public Law and International Law?
- How will the nine judges be selected and nominated for appointment by Royal Decree? Will the Judicial Council have a role?
- How will the court be managed? Will the Constitutional Court be considered a civil court under Article 99 and, if so, is a relationship with the Judicial Council contemplated (for example, to deal with human resource management)?
- What are the budgetary requirements for establishing this new institution, both start-up costs and continuing requirements?
- Will the court have authority to decline to hear a case if it considers it to be without merit? Are there other safeguards against the court being inundated with frivolous challenges or being drawn into disputes that are political more than legal?
- How will the legislation promote both independence of the judges of this court and also accountability? Will Constitutional Court judges be subject to the same ethical standards, inspection, and disciplinary procedures as other judges? Will their performance be evaluated before they are considered for re-appointment?

Subject: Cooperation to increase capacity and competence of the judiciary

USAID Objective: To encourage thoughtful planning and timely, systematic execution of plans to carry out increased responsibilities.

Issues:

- How will the judiciary develop a strategic plan to assure that it will be prepared to carry out the high expectations of the pending constitutional amendments for an independent judicial power?
- Will there be an exercise of self-examination by the judges to determine priority needs?
- Would it be helpful for international partners to finance objective facilitation of such a process by international experts, such as from the International Consortium for Court Excellence?
- Are there foreseeable strategic objectives that are highly likely to be given priority?
- Is it foreseen that a new strategic plan with objectives responsive to the evolving constitutional and legal framework will be needed to replace the Judicial Upgrading Strategy developed by the Ministry of Justice?
- What current international support should be continued or sustained in the new environment?
- What are the likely sources of support for a more independent, accountable, and capable judiciary and what are the likely sources of resistance to reform? What strategies might enhance support and overcome resistance?
- Is consideration being given to public outreach efforts?
- What are the anticipated budgetary requirements and how will they be integrated into strategic planning, both start-up costs and continuing requirements?
- Are there threshold issues on which work can begin now in advance of the development of a strategic plan and calendar? For example, would it be possible to accelerate the development of the administrative units in the Judicial Council, to initiate advanced training and other preparation of prosecutors to be assigned to longer terms of service, or to identify needed changes in staff roles – perhaps through an audit of current human resource needs and availabilities?

Subject: Support for the creation of a sustainable system for providing legal information and services

USAID Objective: To stimulate the formation of a civil society network to extend legal information and services more broadly throughout the Jordanian population.

Issues:

- Would the political climate that contributed to an emphasis on protections for civil liberties in the constitutional amendments also support measures to enable people to exercise those protections?
- Might a consortium of concerned civil society organizations develop a strategy for designing and gaining broad approval for a sustainable system that would make legal information and services available to those in need in communities throughout the country?
- How might such a system be organized to attract a combination of public and civil society participation and funding?
- Are there identifiable priorities that will shape the agenda?

- How could the diverse stakeholder interests be accommodated – in national and municipal government, the judiciary, the organized bar, civil society organizations, etc.?
- Would it be helpful if international partners were to finance objective technical assistance and background information from sources such as the Legal Aid Reformers' Network?
- What other international support would be most useful?
- How should the work begin? Should a small steering group prepare a draft strategic plan for broader discussion?

CONCLUSIONS

The success of any constitutional reform depends on many variables which evolve and interact over time. Political, geographic, economic, and cultural settings differ in many ways. The ultimate impact of reform initiatives is inherently unpredictable. Yet, some settings are more propitious than others. Certainly, the setting in Jordan is a favorable one for reform. In this favorable setting, it can be said with confidence that the recommendations of the Royal Committee on Constitutional Review hold potential for accelerating movement toward a more democratic Jordan, including through improving the balance among executive, legislative, and judicial powers and through strengthening and broadening the application of the rule of law and individual rights.

This memorandum supplements earlier analysis of prospects for justice reform with a description of how the proposed constitutional amendments relate to the reform agenda. In addition, it provides suggestions for USAID engagement on how to seize the opportunity these amendments represent. This examination leads to the conclusion that the opportunity is genuine. The amendments set out worthwhile objectives. Jordanian institutions and society are capable of achieving the objectives of the amendments. USAID can provide valuable support for the Jordanian efforts. While success cannot be guaranteed, the opportunity is important, the challenge is manageable, and the potential of these amendments can be realized. In these circumstances, a determined effort is clearly worthwhile.